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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MONTANA

MISSOULA DIVISION

THE ECOLOGY CENTER, INC., and THE LANDS COUNCIL Plaintiffs, vs. BOB CASTENADA, in his official capacity as Forest Supervisor for the Kootenai National Forest; BRADLEY POWELL, Regional Forester of Region One of the U.S. Forest Service; and, UNITED STATES FOREST SERVICE, an agency of the U.S. Department of Agriculture. Defendants.	CV 02-200-M-DWM ORDER

On July 22, 2004, Defendants and Intervenors dismissed their appeal to the Ninth Circuit Court of Appeals. Defendants have renewed their Fed. R. Civ. P. 60(b) motion in this Court, and this Court now has jurisdiction to consider the Government's

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motion to dismiss. Plaintiffs object to both of these motions.[1]

I. Rule 60(b) Motion

Defendants moved for a lifting of the injunction under Rule 60(b) for reasons 5 or 6. Reason 5 includes "the judgment has been satisfied." In this matter, the June 2003 order read "The Forest Service is enjoined from further timber sales only pending its resolution of these matters on remand," "these matters" meaning the clarification of the amount of old growth on the forest. The Forest Service has done what the Court asked of it and should be relieved of the injunction. Plaintiffs contend that a NEPA case is somehow exempt from Rule 60(b) relief. That is not so. Generally NEPA relief, since NEPA is procedural, will result in a remand to the agency to ensure conformity with proper procedure. In this instance, the Forest Service prematurely concluded the Kootenai Forest contained 10% old growth. The injunction and remand put the evidence supporting that conclusion under the spotlight of public scrutiny. Having fulfilled that requirement, the Forest Service's conclusion based on that evidence satisfied NEPA. The motion is granted.

III. Defendant's Motion to Dismiss

Plaintiffs have filed a motion for summary judgment on the

[1]The Court's order of June 27, 2003 describes the factual background of this case.

outstanding soils issues remaining in the case. Plaintiffs argue that the Kootenai National Forest has violated the National Forest Management Act by failing to insure soil productivity in these timber sale areas. Defendants responded and moved to dismiss or for summary judgment, based on Congress's subsequent legislative action regarding the Kootenai National Forest.

The first issue to be decided is whether Plaintiffs' Complaint states a claim upon which relief could be granted, following the November 10, 2003 Rehabilitation Act (Department of Interior and Related Agencies Appropriations Act of 2004, pub. L. No. 108-108). Section 407 of that Act (the 407 rider) reads as follows:

> IMPLEMENTATION OF RECORDS OF DECISION. The Secretary of Agriculture shall publish new information regarding forest wide estimates of old growth from Volume 103 of the administrative record in the case captioned Ecology Center v. Castaneda, CV 02-200-M-DWM (D. Mont.) for public comment for a 30-day period. The Secretary shall review any comments received during the comment period and decide whether to modify the records of Decision (hereinafter referred to as the 'ROD's') for the Pinkham, White Pine, Kelsey-Beaver, Gold/Boulder/Sullivan, and Pink Stone projects on the Kootenai National Forest. The ROD's, whether modified or not, shall not be deemed arbitrary and capricious under the NFMA, NEPA, or other applicable law as long as each project area retains 10 percent designated old growth below 5,500 feet elevation in third order watersheds in which the project is located as specified in the forest plan. (117 Stat. 1241.)

Plaintiffs argue that this rider violates the constitutional policy of separation of powers, because it legislatively directs the result in ongoing litigation. Mistretta v. United States, 488 U.S. 361 (1989); United States v. Klein, 80 U.S. (13 Wall) 128, 20 L.Ed. 519 (1871). Both parties rely on the same cases, more or less, especially Pennsylvania v. The Wheeling and Belmont Bridge Co., 59 U.S. (18 How.) 421, 15 L.ED. 435 (1855), and Robertson v. Seattle Audubon Soc., 503 U.S. 426 (1992). The parties agree on the fundamental test-Congress can pass a law that applies in ongoing legislation, as long as the law and its application are prospective, and the new law changes the underlying substantive law. The question here is whether the 407 rider does so.

Plaintiffs argue that the rider leaves no discretion to the court, because it does not provide new substantive standards of review, but rather retains the APA standard of review of arbitrary and capricious and directs the result of that analysis. Plaintiffs claim that this court would have no role but to say "Congress has decided this case." Pl.'s Br., 7. Plaintiffs make a distinction between the KNF rider and the rider that the U.S. Supreme Court found constitutional in Robertson by claiming the Robertson rider applied to thirteen forests and dozens of timber sales, whereas 407 applies only to five sales.

Defendants argue that the 407 rider does in fact change the law, in the same way the rider in Robertson did. That is, it is a refinement of the general requirements of NEPA and NFMA, and directs that if the narrower factors are met, the NEPA and NFMA requirements are also met. Defendants point out that the result is still not, theoretically, predetermined, since the forest must still possess 10% old growth below 5,500 feet. If the project areas do not, they can be found to violate the general environmental laws.

This court is obliged to interpret an act of Congress to sustain its constitutionality if possible. NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937). "Separation of powers is violated where 1.) Congress has impermissibly directed certain findings in pending litigation, and 2) did not change any underlying law." Northwest Forest Resource Council v. Pilchuck Audubon Soc., 97 F.3d 1161, 1165 (9th Cir. 1996) (citing Robertson).

In this matter, Congress has not impermissibly directed findings. Congress has modified the law, if it has (see below) to state that if there is 10% on the project areas, then the sales must go forward. The court still has the discretion to determine that there is not 10% on the project areas. The fiction here, of course, is that this court openly expressed, in the June, 2003 order, that Volume 103 appeared to establish the existence of 10%, but that it was not part of the record at the time of decision. Further, the Court stated that the project areas themselves appeared to have 10%, which is the rule of decision supposedly created by the 407 rider. So Congress read the writing on the wall, guessed the probable answer to its test, and then wrote the law so that the result is predetermined. However, by the terms of the rider, this Court could still, somehow, find there wasn't 10% on an area and prevent the sales. Therefore, Congress has not directed these findings.

Second, Congress has changed the underlying law. In Robertson, the Court found that Congress had changed underlying law because, rather than having to comply with an assortment of five environmental statutes and provisions, sales on the selected forests would only have to comply with the two provisions in the rider. The statute at issue in Robertson read, in part, "The Congress hereby determines and directs that management according to [two subsections of this law] on [certain forests] is adequate consideration for the purpose of meeting the statutory requirements that are the basis for the consolidated cases captioned [x, y, and z.]." Robertson, at 1411. The subsections that were deemed sufficient to determine the ongoing litigation, (b)(3) and (b)(5), set the size of spotted owl habitat areas to be protected and prohibited logging in designated spotted owl areas. The court concluded that this provision amended underlying law because sales in these areas were no longer subject to the multifarious analysis of NFMA, NEPA, and the other environmental laws that usually would govern the timber sales. Robertson, at 438.

The scope of the rider was much larger in Robertson than it is here, but the principle is the same. Congress modified NEPA, NFMA, and other environmental provisions for these specific timber sales alone. In Stop H-3 Association v. Dole, (870 F.2d 1419 (9th Cir. 1989)), the Ninth Circuit found that a legislative enactment that ordered the Secretary of Transportation to approve a project "notwithstanding" a section of law that normally must be met for approval did not violate separation of powers. There, of course, the question was between the legislative and executive functions, but much of the analysis applies here, especially the court's repeated assertions that there is "nothing illegitimate about a decision to enact legislation exempting a particular project, the subject of pending litigation, from the requirements of existing statutes." Stop H-3 at 1432, & 1435, n. 24 & 1437 & n. 27. See also Atonio v. Wards Cove Packaging Co., 10 F.3d 1485, 1493 (9th Cir. 1993).

Plaintiffs' dog in this fight is that their soil claims do not get heard. Plaintiffs argue that since the APA standard in 5 U.S.C. § 706(a)(2) includes arbitrary and capricious, an abuse of discretion, "or otherwise not in accordance with law," the 407 rider does not cover all of the grounds on which a sale can be invalidated. Plaintiffs interpret the situations in which "or otherwise..." applies as situations in which the agency has no discretion. Pl.'s Br., 3. Plaintiffs claim that NFMA requires the agency to issue permits only in compliance with Forest Plans, making the arbitrary and capricious standard inapplicable. By including only the arbitrary and capricious phrase in the rider, Plaintiffs argue that Congress intended to retain the other grounds on which a sale could be invalidated, such as not otherwise in compliance with law.

The Government responds that Congress "clearly was evoking the entire APA § 706(2)(A) standard of review." Govt.'s Br., 12. But the Court need not decide this issue, because Plaintiffs have not raised a feasible argument about how this case would fall within the "abuse of discretion" or "not otherwise in accordance with law" elements. These cases always apply the APA standard as a whole, not parse it out into its subsections, and the arbitrary and capricious language is sufficient shorthand for the APA standard.

For the foregoing reasons, it is HEREBY ORDERED that Defendants' Rule 60(b) motion (dkt #97) is GRANTED. The Court's injunction of June 23, 2003 is hereby lifted. It is FURTHER ORDERED that Defendants' motion to dismiss (dkt #82) is GRANTED. Plaintiffs' motion for summary judgment (dkt #79) is DENIED.

DATED this 21st day of August, 2004.

DONALD W. MOLLOY, CHIEF JUDGE
UNITED STATES DISTRICT COURT